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Truck Insurance Exchange v. Kenneth Yardley : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TRUCK INSURANCE EXCHANGE,

Plaintiff-Respondent,

v.

KENNETH YARDLEY, dba YARDLEY DAIRY,

Defendant-Appellant.

Case No. 14541

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT
COURT OF BEAVER COUNTY,
STATE OF UTAH

HON. J. HARLAN BURNS, DISTRICT JUDGE

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE KIND OF CASE

This is a declaratory relief action brought by plaintiff, Truck Insurance Exchange, for a determination that defendant, Kenneth Yardley, is not afforded insurance coverage under a policy of insurance issued by plaintiff for claims made against defendant by one James Cole, who was injured in an accident which occurred on January 25, 1973 at defendant's business premises. The only issue in dispute was whether James Cole was an employee of defendant whose injuries arose out of and in the course of his employment.

DISPOSITION IN LOWER COURT

The case was tried before Judge H. Harlan Burns on April 22, 1975. On the assumption that evidence could be presented by defendant at trial to establish a question of fact, plaintiff prior to trial requested a jury trial on whatever issues of fact may arise (R. 19). At the close of evidence plaintiff moved the Court to rule as a matter of law that James Cole was an employee

of defendant whose injuries arose out of and in the course of his employment (Tr. 119-120).

Following arguments by counsel for plaintiff and defendant which do not appear in the record, the Court found as a matter of law that James Cole was an employee of defendant in the course of his employment at the time James Cole was injured (Tr. 121-122 and R. 44-46).

As to the effect of the employee status of James Cole upon the issue of coverage for defendant under defendant's policy with plaintiff for the claims by James Cole against defendant, the Court took the matter under advisement and allowed counsel for each party ten days to file a brief on the remaining issues of law. The briefs were filed and on February 3, 1976, the trial Court made and entered findings of fact and conclusions of law (R. 44-46) and judgment (R. 47-48) in favor of plaintiff. Defendant appeals from the judgment of the Court in favor of plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to affirm the findings of fact and conclusions of law and the judgment made and entered by the trial Court.

STATEMENT OF FACTS

On January 25, 1973, one James Cole was injured while operating machinery to unload grain from a truck owned by defendant, Kenneth Yardley. Thereafter, Mr. Cole made claims against defendant for his injuries sustained in the accident. At the time of injury, defendant had coverage with plaintiff under an

insurance policy issued by plaintiff to defendant which afforded general liability coverage for defendant's dairy farm, together with automobile liability coverage (R. 3-5 and 7-9). The said insurance policy contained the following exclusion:

> This policy does not apply under:
> (5) Coverages A and G [bodily injury liability and medical payments coverage], except with respect to liability assumed by the insured under a contract as defined herein, to bodily injury or sickness, disease or death of any employee of the insured arising out of and in the course of his employment by the insured, other than a domestic employee whose injury arises out of the ownership, maintenance or use of an automobile covered by this policy and for whose injury benefits in whole or in part are not payable or required to be paid under any workman's compensation law. [emphasis added] (Exhibit P-1 at R. 36)

Thus, the policy excluded coverage for claims made against the insured by an employee for injuries arising out of and in the course of the employee's employment by the insured.

The only issue in dispute when the case came to trial was whether James Cole was an employee of defendant whose injuries arose out of and in the course of his employment by defendant under the terms of the policy (R. 3-5 and 7-9 and Tr. 119-122).

The only witness called at the time of trial were James Cole and defendant Kenneth Yardley. Both witnesses were called by plaintiff and defendant called no witnesses on his behalf.

James Cole testified that he was a retired truck driver. In his prior employment as a truck driver he drove moving vans for two companies (Tr. 4-5). After his retirement he drove a truck and did various odd jobs for various employers (Tr. 10-11). The odd jobs performed by Mr. Cole for the defendant and others were

to supplement his pension and Social Security income. He was not engaged in any business (Tr. 60). The jobs included driving a truck (Tr. 6), doing carpentry work as an assistant (Tr. 7), rounding up cattle (Tr. 8), feeding cattle (Tr. 9), mowing lawns and repairing leaky faucets (Tr. 10). He never advertised that he was an expert truck driver (Tr. 10) and he did not have an office (Tr. 11).

Mr. Cole started working for defendant, Kenneth Yardley, in the fall of 1972, at which time defendant hired him to drive one of defendant's trucks to haul silage to defendant's farm. Defendant made the arrangements for purchase of the silage, told Mr. Cole the route to follow, and paid Mr. Cole $2.50 per hour (Tr. 11-17). Mr. Cole later built cupboards in defendant's house at the direction of defendant's wife. Defendant furnished the materials and defendant's wife told Mr. Cole how she wanted the cupboards built. Mr. Cole was paid $3.00 per hour for his labor (Tr. 17-19). Mr. Cole later assisted defendant in nailing boards to an existing shed. Defendant furnished the materials and tools, instructed Mr. Cole as to how he wanted the work performed, and paid Mr. Cole $2.50 per hour (Tr. 19-20).

About one week to one month after Mr. Cole had hauled silage for defendant, defendant arranged for Mr. Cole to haul grain for defendant's dairy operation (Tr. 21). Defendant told Mr. Cole that he would like Mr. Cole to drive one of defendant's trucks to Venice, Utah, occasionally when defendant would request that he do so, to get grain and bring it to defendant's farm. The trip to Venice and back took about five hours and defendant agreed to

pay Mr. Cole $15.00 per trip. Mr. Cole was paid about the same amount per hour to drive the truck to Venice and back as he had been paid for his assistance in working on defendant's shed (Tr. 61). The trip always took about the same amount of time, but it was sometimes one-half hour to one hour longer and sometimes one-half hour less. He "supposes" that the figure of $15.00 per trip was obtained by figuring how many hours it would take to make the trip and specifying a particular amount per hour (Tr. 70).

On each occasion when he drove defendant's truck to pick up grain, Mr. Cole received instructions from defendant on the day before or the day he picked up the grain (Tr. 24). When he received a call from defendant, Mr. Cole would go to defendant's place of business, get the truck, and drive to Venice. The truck was generally unloaded and ready to go when he arrived (Tr. 26).

When the defendant said that he needed grain, Mr. Cole had to go to get the grain the next day (Tr. 62). He had no authority to have anyone else drive the defendant's truck in his stead (Tr. 63). His agreement with the defendant was not that he would obtain grain for the defendant and use his own method of doing it, using anyone else's truck or hiring anyone else to drive the truck (Tr. 63). The defendant controlled the truck and controlled when he went to Venice and when he came back (Tr. 64).

The arrangements for purchase of the grain were made entirely between defendant and the person from whom defendant purchased the grain (Tr. 23). Mr. Cole always drove defendant's truck and defendant paid for gasoline and oil. Defendant would have paid for any repairs if any had been required (Tr. 23).

Mr. Cole always followed the same route and defendant told him the route to follow (Tr. 25). Mr. Cole always drove to Venice and came back on the same day. His job was to go to Venice and come directly back (Tr. 27).

On one trip to pick up grain in Venice, Mr. Cole took his wife with him and left her in Richfield, Utah, to shop while he picked up grain. He had to go through Richfield to get to Venice and he did not go out of his way. Defendant told Mr. Cole to take his wife with him on that occasion (Tr. 47-48). Mr. Cole occasionally stopped en route to purchase eggs for himself and his neighbors (Tr. 48-49). He picked up the eggs along his route and he did not go out of his way to get them (Tr. 61-62). He would not have driven off his route without the defendant's permission. He felt that if he wanted to do anything with defendant's truck other than go to Venice and back, he would have to ask the defendant's permission (Tr. 62).

Mr. Cole testified that he unloaded the truck one time prior to the day he was injured. The defendant told him to unload the truck on that occasion and he would not have done anything without the defendant's approval (Tr. 28). The defendant paid him $10.00 for his labor (Tr. 28).

On the day before he was injured, Mr. Cole received a call from the defendant requesting that Mr. Cole get a load of grain. Mr. Cole went to the defendant's farm the following morning and saw that there was a little grain left in the corners of the truck. The defendant told Mr. Cole and John Cartwright, another individual who was working for the defendant, to empty the grain from the

truck and make the truck ready for a load of grain (Tr. 81). John Cartwright started the truck and Mr. Cole started the machinery for unloading the grain. Mr. Cole was injured as he was working with the machinery. [illegible] in unloading the truck. Mr. Cole was doing the same thing he had done when he unloaded the truck on the previous occasion (Tr. [illegible]).

The defendant testified that he owns a cow milking operation. In connection with that operation, he owns barns, equipment, [illegible] [illegible] [illegible] by James Cole for the defendant (Tr. 75). Defendant, his father, his wife, and his son do most of the work in the operation but he occasionally has [illegible] people to help [illegible].

The defendant hired Mr. Cole in the fall of 1972 to haul corn silage for him. The defendant paid Cole $3.00 per hour and the defendant furnished the truck, gas, and oil (Tr. 78-79). After the silage had been hauled, the defendant's wife hired Mr. Cole to build cupboards for her and the defendant was present when Mr. Cole was hired. The defendant paid for the lumber and paid Mr. Cole for his labor. Mr. Cole helped the defendant [illegible] nail boards to defendant's cattle shed. He did not discuss wages when he asked Mr. Cole to help him with the shed but he usually paid Mr. [illegible]. The defendant furnished the lumber, materials, and nails. Mr. Cole was merely an assistant (Tr. 82).

The defendant regularly purchased grain for his milling operation from an individual in Venice, Utah. The defendant made the arrangements for the purchase of the grain and he purchased more grain each time his stock of grain became low. The defendant

and his father drove to Venice to pick up the grain occasionally and Mr. Cole also picked up grain for the defendant occasionally when the defendant needed it (Tr. 82-83).

Under defendant's arrangement with Mr. Cole, Mr. Cole used the defendant's truck to pick up the grain and defendant paid for the gasoline and repairs. Mr. Cole had no duty to maintain the truck. Mr. Cole's only job was to drive the truck to Venice, get the grain, put a tarp over it, and return to the farm (Tr. 87).

Each time the defendant needed grain, he would call Mr. Cole the night before and ask Mr. Cole if he could drive to Venice and pick up grain. He does not recall ever calling Mr. Cole when Mr. Cole was unavailable. If Mr. Cole had been unavailable, defendant would have asked his father to pick up the grain or defendant would have done so (Tr. 89-90).

Mr. Cole had no authority to have anyone else drive the truck in his stead (Tr. 89). Mr. Cole did not have any right to determine what use to make of the truck when the defendant hired him to haul grain (Tr. 90). If Mr. Cole borrowed the truck for other purposes, he could use it for those purposes, but when the defendant told him to go after grain, he was supposed to get the grain and come back (Tr. 91). Defendant told Mr. Cole that he could stop in Richfield if his wife wanted to go shopping and he could stop and get eggs, but Mr. Cole understood that he was to return the same day that he left (Tr. 91). The shortest route to Venice from the defendant's farm is through Cove Fort, Utah, and he expected Mr. Cole to follow that route (Tr. 93).

The defendant stated that if Mr. Cole did not comply with

his instructions, he would have had the power to fire Mr. Cole at any time. When the defendant sent Mr. Cole after grain, Mr. Cole did not have the authority to get coal or something else for himself or others (Tr. 97).

Mr. Cole had made seven or eight trips to Venice to get grain prior to the day he was injured. On one of those occasions the truck was loaded with grain and the defendant paid Mr. Cole for unloading the truck because the defendant and his father were busy with other work. Mr. Cole asked for $10.00 for unloading the truck and the defendant paid him the requested amount (Tr. 94-95). Machinery was used to unload the grain from the truck and defendant asked Mr. Cole to watch while the machinery unloaded the truck in case the machinery malfunctioned (Tr. 105-106). Mr. Cole watched as the machinery unloaded the truck and turned off the machinery after the truck was unloaded (Tr. 107).

On the day before the accident, the defendant called Mr. Cole and told him he needed Mr. Cole to get a load of grain. Mr. Cole reported to the defendant's farm the following morning (Tr. 95). The defendant was milking cows and told Mr. Cole that if he would wait until the defendant finished, the defendant would unload the truck so Mr. Cole could take it (Tr. 95). The defendant denies having told Mr. Cole and Johnny Cartwright to unload the truck, but Mr. Cole had unloaded the truck on one previous occasion and knew what to do (Tr. 95-96). While the defendant was still with his cows, he heard the machinery for unloading the truck running. He started to go outside because he wanted to be there to help unload. He had no objection to Mr. Cole starting

the machinery, but he wanted to be there to assist (Tr. 115). Shortly thereafter he learned that Mr. Cole had been injured by the machinery (Tr. 111).

On the basis of the foregoing facts, and viewing them in the light most favorable to the defendant, the trial Court decided in favor of plaintiff as a matter of law and made and entered findings of fact and conclusions of law on February 3, 1976 (Tr. 44-46). The trial Court found that on the date of the accident, James Cole was unloading grain from the defendant's truck for the purposes of preparing the vehicle so that he could fill the truck with grain from another location and take the grain to defendant's place of business, under defendant's orders, supervision and control (Tr. 45). The Court further found that the injuries to James Cole arose out of and in the scope of his employment for the insured as other than a domestic employee, within the terms of the policy held by defendant with plaintiff (Tr. 45). Based upon these facts and the other findings of fact and conclusions of law by the Court set out in the record, the Court concluded that no coverage was afforded to defendant under the policy of insurance held by the plaintiff with defendant for the claim made by James Cole against defendant or for the lawsuit filed by James Cole against defendant (Tr. 3).

Based upon the trial Court's findings of fact and conclusions of law, the trial Court entered a judgment on February 3, 1976, by which it was ordered, adjudged and decreed that defendant is afforded no coverage under his insurance policy with plaintiff for the claims made by James Cole against defendant or for the

lawsuit filed by James Cole against defendant arising out of the accident which occurred on January 25, 1973 (Tr. 47-48).

ARGUMENT

POINT I.

THE EVIDENCE CLEARLY SUPPORTS THE FINDING OF THE TRIAL COURT, AS A MATTER OF LAW, THAT JAMES COLE WAS AN EMPLOYEE OF DEFENDANT WHOSE INJURIES AROSE OUT OF AND IN THE SCOPE OF HIS EMPLOYMENT BY DEFENDANT.

As noted above, the only disputed issue of fact during the trial of the case was the question of whether James Cole was an employee of defendant whose injuries arose out of and in the course of his employment with defendant. In the brief of defendant-appellant, defendant-appellant does not take issue with the trial Court's conclusion that there was no coverage for defendant under the policy held by defendant with plaintiff for the claims by James Cole against defendant, based upon the trial Court's finding that James Cole was an employee of defendant whose injuries arose out of and in the scope of his employment with defendant. Thus, it is not necessary for purposes of this appeal to review the terms of the insurance policy or to review the usual rules of construction of an insurance policy. The only issue on appeal is whether, under the usual meaning of the terms, the trial Court properly ruled as a matter of law that James Cole was an employee of defendant whose injuries arose out of and in the scope of his employment with defendant. In view of the cases and authorities set forth hereinafter, the trial Court was clearly correct

in so ruling.

The majority of the Utah cases concerning the issue of whether an individual is an employee or an independent contractor consists of cases decided under the workman's compensation laws of the State of Utah. The cases consistently have held that the same tests apply under the workman's compensation laws that apply under the common law distinctions between employees and independent contractors. See Murray v. Wasatch Grading Company, 73 Utah 430, 274 P. 940 (1929), Christean v. Industrial Commission, 113 Utah 451, 196 P. 2d 502 (1948), Oberhansly v. Travelers Insurance Company, 5 Utah 2d 15, 295 P. 2d 1093 (1956), and Foster v. Steed, 432 P. 2d 60, 19 Utah 2d 435 (1967). Defendant-appellant has recognized this fact in his brief, and all or most of the cases cited therein are cases decided under the workman's compensation laws of the various states.

The leading Utah case which sets forth the criteria to be applied in determining whether one acting for another is an employee or an independent contractor is Christean v. Industrial Commission, 113 Utah 451, 196 P. 2d 502 (1948), which case adopts the general criteria for distinguishing between an employee and an independent contractor as are set forth in the Restatement of Agency, §220, with the exception of the test of whether or not the one employed is engaged in a distinct occupation or business. The Court in Christean also held that the most important factor by far is the right which the master has to control the actions of the servant. If the master has the right of control, it is not material that he does not exercise that control. The Court

also stated that the right to terminate the business relationship at any time in effect gives the person with that right control over the one acting for him, although this is not the sole and exclusive test.

The Utah courts have held continually that the right to control is the most important criterion in determining whether an individual is an employee or independent contractor. See Foster v. Steed, 19 Utah 2d 435, 432 P. 2d 60 (1967), Thiokol Chemical Corporation v. Peterson, 15 Utah 2d 355, 393 P. 2d 391 (1964), Dowsett v. Dowsett, 116 Utah 12, 207 P. 2d 809, Utah Fire Clay Company v. Industrial Commission, 86 Utah 1, 40 P. 2d 183 (1935), and Harry L. Young & Sons, Inc. v. Ashton, ___ Utah 2d ___, 538 P. 2d 316 (1975).

Dowsett v. Dowsett, supra, adopted the control tests as set out in Restatement of Agency, §220, Comment C. The tests of control or right to control are now discussed in Restatement of Agency 2d, §220, Comment D, which states that,

> Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking....

Thus, it is the right to control which is the important test and the right to control may be minimal.

Defendant-appellant's brief relies essentially on the case

of Parkinson v. Industrial Commission, 110 Utah 309, 172 P. 2d 136 (1946), contending that the Parkinson case "poses a very similar set of facts" to the present case. In Parkinson, defendant Molyneaux made arrangements with Parkinson, the receiver of Woolsulate, Inc., to haul coke to the company's plant. Molyneaux was to furnish his own truck and the gasoline and oil to operate it. He was also required to keep the truck in repair at his own expense. He was to receive $2.50 per ton for the coke hauled to the Woolsulate plant from one location and $4.00 for coke hauled to the Woolsulate plant from another location.

Parkinson told Molyneaux that Woolsulate needed about thirty-five tons of coke each week, but Molyneaux could haul all the coke he wanted to, as long as Woolsulate had room to store it. He was not required to haul the coke on any particular day or at any particular time and his only obligation was to haul a minimum of thirty-five tons of coke per week and to unload the coke where he was directed. Woolsulate did not have the right to tell Molyneaux how much to haul in each truckload, how to drive, or what route to take. Woolsulate had a bin into which Molyneaux normally dumped the coke, but if Molyneaux wanted to haul more coke in any particular week, he was allowed to dump his load in a separate stockpile.

Molyneaux had purchased his truck in 1942, over two years prior to the time that he began hauling coke for Woolsulate and continually thereafter he engaged in the business of trucking for various individuals, always using his own truck under the same arrangements. The Court noted that "he was in the business of a

private carrier by truck" and he was engaged in the independent calling of a trucker."

The major factors considered in Parkinson were the fact that the only control exercised by Woolsulate was that Molyneaux was to haul a minimum of thirty-five tons of coke per week and that Molyneaux was engaged in an "independent calling" or "own business" under which he used his own truck and paid all expenses in connection with the use of the truck in his trucking business. The Court essentially added the "independent calling" or "own business" test to the tests enumerated in Christean v. Industrial Commission, supra. The Court held as follows:

> In this case, Molyneaux, who had an independent calling, contracted to do a piece of work of a type usually done by one having the same independent calling. He contracted to do the work according to his own methods and without being subject to the control of his employer except as to the results of his work. [emphasis supplied by Court]

In the present case, on the other hand, it is clear that Mr. Cole was not engaged in the independent calling of a truck driver. He did odd jobs of all varieties for different people, and even did many different types of jobs for defendant. He was paid approximately the same amount per hour for driving the grain truck for defendant as he had been paid in his other jobs for defendant. He did not supply his own truck but used the defendant's truck. Defendant paid for gasoline, oil, maintenance and repairs on the truck. On each occasion that defendant needed grain he would call Mr. Cole and Mr. Cole would come over the following morning to drive the truck to get grain and come back. The truck was always maintained and ready to go when he picked it

up except on the two occasions when it was necessary to remove grain from the truck before driving it. Mr. Cole also worked for defendant building cupboards, nailing boards, and hauling silage. He worked for others doing various farm chores, mowing lawns, driving their trucks, and doing whatever jobs were available. He never advertised that he was an expert truck driver.

Mr. Cole was also subject to extensive supervision and control by defendant. Just as defendant had exercised nearly total supervision and control over the work performed by Mr. Cole in the other odd jobs performed by Mr. Cole for defendant, defendant exercised a very high degree of control over Mr. Cole in connection with the hauling of grain by Mr. Cole for defendant. The getting of grain for defendant's dairy cattle was a regular part of defendant's business. Defendant and his father often made the trip to get the grain and defendant also had Mr. Cole make the trip on frequent occasions. Each time he wanted Mr. Cole to make a trip to pick up grain, defendant would tell Mr. Cole that he wanted Mr. Cole to make the trip the following day. Mr. Cole was not free to make the trip whenever he wanted, but had to make the trip that day. Mr. Cole could only use defendant's truck. Mr. Cole had no authority to have anyone else drive the defendant's truck in his stead and he could not use his own method in obtaining the grain. The defendant controlled his truck and controlled when Mr. Cole went to Venice and when he came back. Defendant told Mr. Cole the route to follow.

Although Mr. Cole took his wife with him on one trip to pick up grain and left her to shop in Richfield, Utah, while he

got the grain, he did not go out of his way and merely picked up his wife on his way back. Defendant told Mr. Cole to take his wife with him on that occasion. Although Mr. Cole occasionally stopped en route to purchase eggs for himself and his neighbors, there is no evidence that he had "a small egg-selling business" as defendant-appellant argues in his brief. There is no indication that he ever made any profit from the eggs he picked up. He picked up the eggs along his route and did not drive out of his way to get them. He would not have driven off his route without the defendant's permission. Mr. Cole felt that if he wanted to do anything with defendant's truck other than go to Venice and back, he would have to ask defendant's permission.

Under the defendant's own testimony, Mr. Cole had no authority to allow anyone else to drive the truck in his stead and Mr. Cole did not have any right to determine what use to make of the truck. He expected Mr. Cole to follow the shortest route and told him the route to follow. If Mr. Cole did not comply with defendant's instructions, defendant would have had the power to fire Mr. Cole at any time. When the defendant sent Mr. Cole on a trip after grain, Mr. Cole did not have the authority to get coal or something else in the truck for himself or others. Mr. Cole was required to return the truck on the same day he left, although he could stop along the way for a short time if he wished to do so.

In view of the numerous extensive controls which defendant exercised over Mr. Cole and the more numerous and extensive rights which defendant had to control the activities of Mr. Cole as

discussed herein and in the previous statement of facts, it is difficult to see how defendant-appellant can contend that James Cole was an independent contractor, having his own business and not subject to the control of defendant. The important factor to consider being the control or right of control by the master, there are very few situations in which the master could have more control over the actions of his servant than the defendant had over the actions of Mr. Cole as specified above.

Defendant failed to obtain workman's compensation coverage or other insurance coverage for the employees in his business operation (Tr. 121), and he would now have the Court decide that in spite of his failure he should be covered for the loss under a general liability policy which specifically excludes coverage for employees injured during the course of their employment under which rates are set accordingly. Defendant exercised very extensive control over the activities of James Cole and now asks the Court not to determine as a matter of law that James Cole was an employee of defendant. In that respect, this case is very similar to the case of Harry L. Young & Sons, Inc. v. Ashton, ___ Utah 2d ___, 538 P. 2d 316 (1975), in which the Court stated that the employer wanted the "best of two possible worlds." The Court stated that the employer wanted:

> On the one hand, to have a person rendering a service over whom he can maintain a high degree of control; and at the same time give the person the status of an independent contractor to avoid the responsibilities he would have to an employee.

In Harry L. Young & Sons, Inc. v. Ashton, supra, the

defendant drove a truck for the plaintiff under a contractual arrangement with plaintiff by which he would lease the plaintiff's truck and be paid on a per mile basis. He then received instructions from the plaintiff as to when and where to drive the truck. The defendant was injured while climbing on the truck to secure his load and he sought to obtain an award of workman's compensation on the basis that he was an employee of the plaintiff. The Court held that in spite of the efforts by plaintiff to disguise the true nature of the relationship, the defendant was an employee of the plaintiff.

In the present case, unlike the Ashton case, the defendant did not even attempt to disguise the relationship of employer-employee existing between defendant and James Cole prior to the accident upon which Mr. Cole based his claims against defendant. It was only after the injury that the defendant determined that it would be in his interest to establish that the relationship was not that of employer and employee. From the facts set out above, it is clear that the defendant had an almost total right to control the activities of James Cole and he exercised that right to a great extent. He should not be allowed now to have possessed that almost total control over Mr. Cole and yet, when it suits his purposes, have Mr. Cole considered by the courts as an independent contractor.

A case which is very persuasive on the issue in question is Dalton v. Industrial Commission, 8 Utah 2d 353, 334 P. 2d 763 (1959). In that case, the plaintiff was injured while transporting an automobile from Rock Springs, Wyoming to Ogden, Utah

for Wayne Rasmussen Company, a new and used car sales business. The company customarily used regular employees to transport the cars but charged the extra amounts which the employees were paid for transporting the cars to the cost of the cars. The company occasionally hired people who were not its regular employees to transport cars and charged the amounts paid to those persons to the cost of the cars in the same manner. A representative of the company approached the plaintiff and his brother and asked if they would like to transport cars from Rock Springs, Wyoming, to Utah. The representative said that the plaintiff and his brother would receive $25.00 for their services, out of which they were to pay their own bus fare of $5.00. All expenses for oil, gas or any emergency repairs were to be paid by the company. The Industrial Commission held that the plaintiff was not an employee of the company in transporting the car and the Supreme Court reversed, holding that the amount which the plaintiff received was compensation and wages and the plaintiff was an employee of the company.

If the plaintiff in Dalton was considered to be an employee of the Wayne Rasmussen Company, surely the trial Court properly held as a matter of law that James Cole was an employee of defendant at the time of the accident in which Mr. Cole was injured. In Dalton there is no indication that the amounts received by the plaintiff for his services had any relation to the time involved in performing those services. The plaintiff had not worked for the company previously and there was no indication that the transporting of the car was a continuation of previous work for the company. Most importantly, there was no indication

that the company exercised the very high degree of control over the plaintiff in Dalton that the defendant exercised and had the right to exercise over Mr. Cole in the present case. As indicated previously, the defendant controlled or had a right to control virtually every activity by Mr. Cole during the time that Mr. Cole was using the defendant's truck to pick up grain and haul it to the defendant's farm. The defendant did not object if Mr. Cole made brief stops en route, but he demanded that Mr. Cole return with the truck the same day he took the truck. Mr. Cole was not free to use the truck in any manner he wished and in every other respect his activities were controlled by defendant.

In view of this very extensive control, plaintiff-respondent respectfully submits that the evidence clearly supports the finding of the trial Court that reasonable minds could not differ on the question of whether James Cole was an employee of defendant whose injuries arose out of and in the scope of his employment by defendant, and the trial Court properly ruled as a matter of law that James Cole was such an employee.

POINT II.

THE TRIAL COURT PROPERLY HELD, AS A MATTER OF LAW, THAT JAMES COLE'S INJURIES AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT BY DEFENDANT.

Point II of the brief of defendant-appellant is difficult to understand but it appears to be contending that the trial Court improperly ruled that the injuries of James Cole arose out of and

in the scope of his employment for the insured (the defendant). The argument is based on semantics, in that the Court ruled at the time of trial, as a matter of law, that James Cole was an employee of defendant at the time he was injured (Tr. 119-122) and the Court's findings of fact, based upon the Court's determination at trial, state that "the injuries of James Cole arose out of and in the scope of his employment for the insured as other than a domestic employee" (R. 45). In other words, the Court ruled on the existence of this fact in connection with its ruling that James Cole was an employee of defendant at the time he was injured, both as a matter of law.

Even if there were any substance to the argument contained in Point II of appellant's brief, this Court should not consider the matter in that the issue is being raised for the first time on this appeal. The Utah Supreme Court consistently has held that it will not consider a matter raised for the first time on appeal. See State By and Through Road Commission v. Larkin, 27 Utah 2d 295, 495 P. 2d 817 (1972), Wagner v. Olsen, 25 Utah 2d 366, 482 P. 2d 702 (1971), and In re Ekker's Estate, 432 P. 2d 45, 19 Utah 2d 414 (1967).

When the Court ruled on the motion of plaintiff-respondent at the close of the evidence, it is apparent that the Court and the attorneys for the parties presumed that the decision was being made on the entire issue, i.e. whether James Cole was an employee of defendant whose injuries arose out of and in the scope of his employment (Tr. 119-124). It is further clear from the Court's findings of fact and conclusions of law that the Court decided

the entire issue as a matter of law (R. 44-46).

Defendant made no objection to the trial Court's findings in the Court below and never raised the issue at any time until this appeal. Following the trial Court's rulings at trial the defendant submitted a Memorandum of Points and Authorities to the Court on the remaining issues, as requested by the Court. The memorandum discusses the trial Court's ruling that James Cole was an employee of defendant, but the memorandum raises no other issues. Defendant made no objections to the findings of fact and conclusions of law submitted to the trial Court by plaintiff, either before or after the trial Court reviewed and signed the findings of fact and conclusions of law. The defendant made no post-trial motions and never raised the issue until the defendant-appellant's brief was filed with this Court.

If this Court were to accept the contentions made in Point II of defendant-appellant's brief, this Court would have to conclude that the issue cannot be considered by this Court on appeal, since the matter was never raised in the Court below.

In any event, from a review of the evidence produced at trial it is clear that James Cole was within the scope of his employment with defendant at the time he was injured. The grain elevator which Mr. Cole was operating at the time he was injured belonged to the defendant, it was on defendant's business property, and Mr. Cole was using the elevator to remove grain from defendant's truck so that Mr. Cole could use the truck to get more grain for defendant pursuant to defendant's instructions. Mr. Cole testified that defendant specifically told him to unload the

grain but defendant denied having told him to do so. Defendant testified, however, that Mr. Cole had unloaded the truck previously and knew how to operate the grain elevator. Defendant had no objection to Mr. Cole operating the grain elevator but he wanted to be there to assist.

Even if we assume that defendant had not instructed Mr. Cole to operate the grain elevator on that occasion, it is clear that Mr. Cole was operating within the scope of his employment. With respect to injuries sustained by an employee outside his actual working hours, 53 Am. Jur. 2d, Master and Servant, §182, states:

> The master-servant relationship is not restricted to the employee's actual working hours but includes those times when the employee is on the employer's premises and engaged in the performance of his services or duties incidental thereto. Thus, the relationship may exist with respect to an employee on the premises of the employer while going to his work and may continue for a reasonable time after working hours for the purpose of allowing the servant sufficient time to leave the premises, or for so long as the employee is on the employer's premises, engaged in the actual or incidental duties of his employment, or subject to the employer's control....

The matter of scope of employment in those circumstances is covered in the annotation found at 76 A.L.R. 2d 1215, entitled Liability of Master for Injury or Death of Servant on Master's Premises Where Injury Occurred Outside Working Hours. The cases cited in the annotation make it clear that the injuries sustained by the employee may occur before or after his employment and he will still be considered within the scope of his employment. One of the cases cited in the annotation is Geanakoules v. Union

Portland Cement Company, 41 Utah 486, 126 P. 329 (1912). In Geanakoules the plaintiff came upon the defendant's premises to look for work. He talked to the foreman and the foreman said, "I'll give you a job; you can start with the whistle; take off your coat and start on your job." Before the plaintiff started to work he inquired about and was directed to the toilet. On his way to the toilet, he stepped on hot ashes and burned his foot, for which injuries he sued the defendant company. The Court held that the plaintiff was not a trespasser or a mere licensee, but rather an employee of defendant at the time of the accident, even though he had not yet begun his employment.

In another context, the Utah Supreme Court has held that even a battery by an employee upon a customer of the employer may be considered within the scope of the employee's employment if it is committed in furtherance of the principal's interests. See Barney v. Jewel Tea Company, 104 Utah 292, 139 P. 2d 878, and Stone v. Hearst Lumber Company, 15 Utah 2d 49, 386 P. 2d 910 (1963). Adopting the defendant's version of the facts in the present case, it is clear that James Cole was acting within the scope of his employment at the time he was injured. Defendant did not instruct the plaintiff not to unload the truck, the truck had to be unloaded in order to make it ready for another load of grain, Mr. Cole had unloaded the truck before and knew how to unload it, and defendant had no objection to Mr. Cole starting the machinery to unload the truck.

A case particularly in point on this issue is Milbank Mutual Insurance Company v. Biss, 161 N.W. 2d 622 (Minn. 1968).

In Biss, the insured had a policy very similar to the policy held by defendant with plaintiff in the present case which excluded coverage for liability of the insured for injuries to his employees arising out of and in the course of their employment. The insured operated a farm and hired the claimant and other boys to assist in harvesting grain. The claimant's compensation was not to begin until he started working in the grain field. While waiting for the machinery used in harvesting the grain to begin functioning, the claimant was sent to the insured's farmyard to prepare the grainery bin for receiving oats which were being harvested. On the way back from the grainery bin, the claimant fell out of the truck in which he was riding and was injured. The trial Court held that, based upon the facts presented, the claimant was not acting within the scope of his employment since he was not to receive compensation for the work he was performing and the work for which he was to receive compensation was totally unrelated and in a distant location from the work he was performing when he was injured. The Supreme Court reversed, holding as a matter of law that the claimant was acting within the scope of his employment at the time of the accident.

If the claimant in Biss was acting within the scope of his employment, it is clear that James Cole was acting within the scope of his employment with defendant in the case at bar. Not only was Mr. Cole doing work preparatory to the work which he was required to perform for defendant, but he had done the work before, it was essential to his performing his duties as required by defendant and it involved the same equipment (the truck) which he

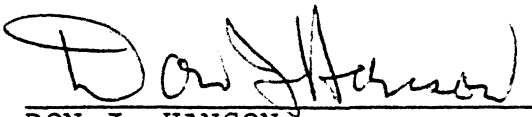
would be using in carrying out his employment with defendant. Therefore, it is clear that the trial Court properly found, as a matter of law, that James Cole was acting within the scope of his employment by defendant at the time he was injured.

CONCLUSION

On the basis of the cases, authorities, and analysis set forth above, the evidence presented at trial clearly supports the trial Court's finding, as a matter of law, that James Cole was an employee of defendant whose injuries arose out of and in the scope of his employment by defendant. Point II of appellant's brief was not raised at any time in the lower Court prior to this appeal and, therefore, it should not be considered. If it were considered, however, the evidence presented at trial clearly supported the trial Court's finding, as a matter of law, that the injuries sustained by James Cole arose out of and in the course of his employment by the defendant. Plaintiff-respondent, therefore, respectfully submits that this Court should affirm the judgment made and entered by the trial Court, based upon the Court's findings of fact and conclusions of law.

Respectfully submitted,

HANSON & GARRETT



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Certificate of Mailing

I hereby certify that on the 2 day of August, 1976, I mailed two (2) copies of the foregoing brief of plaintiff-respondent to Joseph E. Jackson, attorney for defendant-appellant, Cline, Jackson, Mayer & Benson, Prudential Plaza--Suite H, 110 North Main Street, Cedar City, Utah 84720.

Attorney